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No. 97-1217

Supreme Court, U. S. F I L E D MAY 6 1998 CLERK
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In The
Supreme Court of the United States
October Term, 1997

STATE OF NEW MEXICO, EX REL. MANUEL ORTIZ,
Petitioner,
v.

TIMOTHY REED,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of New Mexico

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In his Brief In Opposition Respondent (Reed) raises three points for the first time: 1) the inapplicability of *Michigan v. Doran*, 439 U.S. 282, 289 (1978); 2) the concurring opinion in *Reed v. State ex rel. Ortiz*, 124 N.M. 129, 947 P.2d 86 (1997) (at Appendix A of the Petition, hereafter *Reed*, App. A at ___), as an independent basis for upholding the denial of extradition; and 3) the unique aspects of this case. The first two points are closely related and are addressed together in the first section of this Reply Brief. The Reply Brief is filed pursuant to the oral request on April 25, 1998, by the Clerk's Office, and is timely filed on May 4, 1998, in typewritten form, with printed copies in compliance with Rule 33 to follow.

I. DUE PROCESS DOES NOT REQUIRE A HEARING TO ESTABLISH PROBABLE CAUSE AT ANY TIME PRIOR TO RETURN OF A PAROLE VIOLATOR TO THE DEMANDING STATE

Reed has attempted in his Brief In Opposition to forge new constitutional requirements for the extradition of parole violators. In *Doran*, 439 U.S. at 289, this Court recognized that a judicial finding in the demanding state of probable cause that a crime has been committed is a prerequisite for extradition of a person charged with a crime. Reed first argues that *Doran* is inapplicable because there has been no hearing by Ohio to determine probable cause that he violated his parole. Brief In Opposition at 11.

Next Reed insists that the judicial determination of probable cause which is required under *Doran* for extradition of one charged with a crime also requires a hearing to determine probable cause prior to extradition of a parole violator. Brief In Opposition at 12. This would graft the due process protections afforded prior to revocation of parole under *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972), onto the requirement in *Doran* that a

fugitive be "charged with a crime" in the demanding state.

A convicted felon accused of a parole violation is entitled as a matter of due process to a preliminary hearing to establish probable cause that he has violated parole. *Morrissey*, 408 U.S. at 485-86. However, the parole violator who flees the jurisdiction is not entitled to this hearing prior to issuance of a governor's warrant or during his detention in the asylum state while he contests rendition. He is entitled to such a hearing upon his return to the demanding state. Ohio's extradition demand, found in the official New Mexico court record (Record Proper) at pages 83 to 91, sought Reed's return for "a parole violation on-site hearing."

The majority opinion, *Reed*, App. A at 28-29, in accord with other courts, held that an administrative declaration of a parole violation satisfies the "charged with a crime" requirement since a parole violator remains "charged with a crime" until the judgment of conviction is satisfied. See *State ex rel. Sheppard v. Kisner*, 394 S.E.2d 907, 908 (W. Va. 1990); *Ellis v. Darr*, 640 P.2d 361, 362 (Kan. Ct. App. 1982); *State ex rel. Reddin v. Meekma*, 306 N.W.2d 664, 667 (Wis.), cert. denied, 454 U.S. 902 (1981); *Singleton v. Adams*, 298 N.W.2d 369, 370 (Neb. 1980); *Morgan v. Miller*, 593 P.2d 357, 358 (Colo. 1979); *State ex rel. Danforth v. Bordurant*, 566 S.W.2d 478, 482 (Mo. 1978); *Snyder v. State*, 516 P.2d 700, 702 (Idaho 1973); *Fisco v. Clark*, 414 P.2d 331, 334 (Ore. 1966). The extradition statutes of New Mexico and Ohio require only an administrative declaration of a parole violation to support extradition of a paroled felon. N.M.S.A. 1978, § 31-4-25(B); Ohio Rev. Code, § 2963.21 (1953). Reed was "charged with a crime" in Ohio.

As to this argument, Reed apparently considers only the criminal charges in Kentucky as a basis for parole violation in his position that a hearing to establish probable cause was required either before Ohio's governor's

requisition issued or before New Mexico acted on that requisition. Probable cause to believe Reed had committed this parole violation could rest on the fact that Reed was convicted of the Kentucky charge of "terroristic threatening" of Steve Devoto about four months after he fled Ohio. *Reed*, App. A at 14. Moreover, the Ohio requisition relies on the additional grounds for parole violation that Reed absconded from supervision, failed to follow the instructions of his parole officer and left Ohio without permission (Record Proper at 83). Reed's presence in New Mexico alone would establish probable cause to believe he violated the universal parole condition that a parolee not leave his supervising state. A hearing to establish probable cause on Reed's parole violations would merely confirm the obvious.

As a second argument, Reed insists the concurring opinion of Justice Minzner provides an independent due process ground supporting denial of extradition. Brief In Opposition at 12-13. See *Reed*, App. A at 74-82. Justice Minzner concluded that the passage of time since Reed's parole violation and during his detention in New Mexico on a fugitive warrant extinguished Ohio's opportunity to afford Reed the requisite *Morrissey* preliminary hearing consistent with due process. *Reed*, App. A at 83.

Justice Minzner would have required that the *Morrissey* probable cause hearing be held *in absentia* in Ohio while Reed was being detained in New Mexico, reasoning that when Ohio learned Reed had been apprehended as a fugitive in New Mexico it was obligated to "have provided notice to Reed of a hearing in Ohio and counsel at the hearing on his behalf" and its failure to do so during the time Reed was resisting extradition in the courts of New Mexico means "Ohio could not now constitutionally hold a preliminary hearing for a probable cause determination." *Reed*, App. A at 74-84. A substantial number of cases have rejected this view. See *Kisner*, 394 S.E.2d at 908; *Darr*, 640 P.2d at 362; *Singleton*, 298 N.W.2d at 370. The

only support found by the State for Justice Minzner's view that a hearing is required before rendition of a parole violator is *Petition of Hayes*, 468 N.E.2d 1083, 1086-87 (Mass. Ct. App. 1984) (a hearing to determine probable cause must occur in the demanding state before rendition on an alleged probation violation).

Reed's due process claims rest in part on Justice Minzner's footnote conclusion that, even if a *Morrissey* preliminary hearing is not constitutionally mandated for rendition of a parole violator, it is constitutionally mandated for a fugitive Ohio parole violator due to her reading of Ohio's statutes. *Reed*, App. A at 76-78 n.1 (citing, *inter alia*, Ohio Admin. Code § 5120:1-1-18 (1979, prior to 1995 amendment)). This reasoning is flawed both because it establishes the New Mexico Supreme Court as interpreter of the constitutional implications of Ohio's laws and because it misreads those laws. Reed would have the Court deny the Petition because he believes Justice Minzner correctly reads Ohio law to require a "detainer" which he thinks is missing from the record, a requirement for which he cites Ohio Admin. Code § 5120:1-1-18(A), (C)(2) and (F) (1979 versions in effect on March 23, 1993, the date Respondent fled Ohio). Brief In Opposition at 13.

Reed overlooks the important fact that the detainer requirement of Ohio Admin. Code § 5120:1-1-31(C)(2) (1979 version) only applies "[I]f such releasee is within the State of Ohio" and that none of these provisions applies to him because he is a fugitive felon found outside Ohio. See Ohio Admin. Code § 5120:1-1-18(B) (1979 version) ("The Extradition of Fugitives Act shall apply when the releasee leaves the State of Ohio without lawful authority"). Ohio's extradition statute provides for return of a convicted felon who has broken the terms of his parole upon written application to the governor by the parole authority requesting the fugitive's return accompanied by certified copies of conviction. Ohio Rev. Code

§ 2963.21 (1953). Ohio's extradition demand here included exactly the documents required by Ohio's extradition statute (Record Proper at 83-91). The appropriate procedure was employed when Reed's extradition was sought.

To further complicate the interplay between extradition and the *Morrissey* right to a preliminary hearing, the majority in *Reed*, App. A at 41-45, concluded that Reed's expectation that Ohio officials would deny him a *Morrissey* preliminary hearing created "duress" which justified his flight from that prospective denial of due process. The need to correct this conclusion continues to support granting the Petition. See Petition at 7.

The misinterpretation of Ohio law by Reed and by Justice Minzner strengthens the grounds which support grant of the Petition. The Petition does not seek nor require the Court to interpret and apply Ohio's extradition statute or hearing provisions. Under the Extradition Clause it is New Mexico's obligation to return Reed, a fugitive parole violator sought by Ohio, to that state. In Ohio the courts are open to Reed should he be dissatisfied with the hearings conducted when revocation of his parole occurs or should he be denied those hearings to which due process entitles him. Review of this case will provide an opportunity to reinvigorate the basic tenet upon which the Extradition Clause is founded: a fugitive must be returned so that the demanding state may interpret and apply its laws to a fugitive who fled from that state.

Ohio is entitled under the Extradition Clause and the Supremacy Clause to have Reed returned. The need for this Court to interpret the extent, if any, to which *Morrissey* applies in the extradition context supports grant of the Petition. The State respectfully requests the Court grant the Petition for the reasons stated therein as well as to address the extent, if any, to which an asylum court may review on habeas corpus the due process afforded to

the fugitive parole violator when the demanding state seeks his extradition.

II. THE CLAIMS MADE IN THIS CASE ARE NOT UNIQUE AND THEIR CONSIDERATION BY THE COURT WILL PROVIDE GUIDANCE IN EVERY EXTRADITION CASE

Reed seeks refuge in the shelter of the Great Writ of habeas corpus from the demands of the Extradition Clause, assuring the Court that the singular facts he "proved" to the courts of New Mexico entitle him to a remedy unfit for any other fugitive. Brief In Opposition at 14. Reed's circumstances are not unique and nothing in his predicament merited the New Mexico Supreme Court's unheralded departure from the Court's interpretation of the Extradition Clause.

The State respects the writ of habeas corpus as an essential remedy for grave injustices. Reed is in the fortunate position of having suffered no injustice. On the contrary he has been afforded undeserved freedom from the consequences of his felony convictions in Ohio through a mistaken use of the Great Writ by New Mexico courts. Nothing about Reed's flight to avoid his sentences for felony convictions or his belief that Ohio authorities would conspire to do him harm is unique to Reed.

Over the State's strong objections that a New Mexico court was without power to litigate the claim that Reed expected to be denied due process and to suffer grave harm in an Ohio prison, Reed was permitted to testify and to present affidavits to that effect. To meet this improperly-considered evidence Ohio officials and Ohio prisoners would have been required to testify in New Mexico that Ohio's prison system conforms to constitutional requirements. They also would have had to convince the court there was neither an intent to murder Reed nor any constitutional infirmity in the effort to have

him fulfill his lawful prison sentence. Reed attempts in his Brief In Opposition and its Appendix 1 to characterize the State's position in the New Mexico Supreme Court as conceding the propriety of a New Mexico court deciding whether Reed would receive constitutional treatment in Ohio. On the contrary, the State's consistent claim has been that an asylum court is without the power to require a demanding state to defend the prospective constitutionality of its institutions or the conduct of its officials.

Reed's claim that the demanding state might have presented evidence by phone or on paper does not vitiate the demanding state's burden. Given the number of extradition requests every year, a requirement to present evidence by affidavit or by telephone would be substantial. Additionally, affidavits or telephone testimony would run the risk of failing to be persuasive in the face of the live testimony given by the fugitive. If the demanding state is obligated to answer a claim that it intends to deprive the fugitive of his constitutional rights, it would be prudent to present live witnesses in court where the trier of fact could observe the sincerity with which a claim of prospective constitutional treatment of the fugitive could be fairly evaluated.

The only extraordinary circumstance in this case is that the New Mexico Supreme Court gave its approval as a matter of constitutional law to the requirement that Ohio present evidence in a New Mexico court defending its penal system as one which recognizes and respects the United States Constitution. The court sought to mollify the undue burden this imposes on a demanding state by holding the fugitive to proof beyond a reasonable doubt. *Reed*, App. A at 22. However the demanding state would be obliged to answer such claims vigorously since failure to do so convincingly would result in conceding the matter to the fugitive, who would carry his burden by testifying to his fear of unconstitutional treatment, as occurred here. *Reed*, App. A at 54-63.

Nothing about the grave claims made by Reed is unusual in the extradition context. It is not unusual for a fugitive to object that his return to prison in the demanding state will result in a harmful and unconstitutional infringement of his rights. In *Pacileo v. Walker*, 449 U.S. 86, 87-88 (1980), the fugitive claimed his rendition to Arkansas should be denied unless a California court held an evidentiary hearing and concluded that Arkansas would not impose cruel and unusual punishment. In *Sweeney v. Woodall*, 344 U.S. 86, 89 (1952), the fugitive resisted rendition to Alabama on the ground that his imprisonment there would include cruel and inhumane mistreatment which would threaten his life. As the Court held in each of these cases, such claims are entitled to a full and fair consideration by a court in the demanding state but not in the asylum state to which the fugitive has fled.

Reed's claim that this case is singular and of no precedential value is defeated not just by studying the implications of its holding, but also by actual experience in the short time since the decision was rendered. Forty states joined as *amici* urging the Court to review the case due to the extraordinary burden it will place on extradition cases. As it circulates among fugitives and their legal representatives *Reed* will spawn a growing number of similar claims, burdening the extradition process with evidentiary hearings on every attempted rendition.

A recent order by the New Mexico Supreme Court proves the point. In a case in which the trial court dismissed with prejudice an Arizona extradition requisition seeking return of a charged kidnapper, the New Mexico Court of Appeals reversed on the ground that the trial court's action violated extradition precedent and that a contrary result was not supported by *Reed*, because *Reed* arose from singular and unique facts which brought it "outside the ordinary tenets of extradition law." See *Reed*, App. A at 53. The New Mexico Supreme Court granted a

petition for writ of certiorari on the following issue: "Whether the New Mexico Court of Appeals improperly denied defendant her due process rights under the New Mexico Constitution and misunderstood the nature of the court's jurisdiction as explained in *Reed v. State ex. rel. Ortiz*, 1997-NMSC-055." *State v. Diaz*, No. 25,001 (order issued April 23, 1998, attached herein as Appendix C). Clearly in New Mexico demanding states which fail to defend against claims by a fugitive of expected ill treatment face denial of rendition. This is a plain violation of the Extradition Clause and is not restricted by any facts unique to *Reed*.

It is for the state and federal courts of Ohio to resolve Reed's claims. New Mexico courts are not a proper forum for litigating the constitutionality of Ohio's prospective treatment of Reed. The New Mexico Supreme Court ignored the Extradition and Supremacy Clauses when it required Ohio to defend its officers and institutions or risk denial of its extradition demand. Ohio suffered the humiliating indignity of New Mexico's conclusion that Ohio's future conduct toward Reed rendered him "a refugee from injustice" who was "forced to choose between flight and death." *Reed*, App. A at 41, 46. This improperly conferred upon Reed a judicial commutation of his Ohio sentence.

Since ratification of the United States Constitution in 1787 which included the Extradition Clause, no state has been permitted to sit in judgment of the extent to which a sister state's penal institutions afford its convicted felons the constitutional protections to which they are entitled. If a demanding state can be made to answer such claims in a hearing conducted in the asylum state it should be this Court which so holds. Reed's expectation of unjust treatment in the prisons of the demanding state is a common complaint of fugitives. The State steadfastly maintains the assertion made in the Petition that requiring demanding states to answer such claims in the courts

of asylum states will cause the extradition process to dissolve into chaos. The State respectfully urges the Court to grant the Petition.

Respectfully submitted,

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APPENDIX C
IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

April 23, 1998

NO. 25,001

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

ALEJANDRA DIAZ,

Defendant-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon a petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised issued its writ of certiorari on April 2, 1998;

WHEREAS, the petition was GRANTED on the following issue:

Whether the New Mexico Court of Appeals improperly denied defendant her due process rights under the New Mexico Constitution and misunderstood the nature of the court's jurisdiction as explained in *Reed v. State ex rel. Ortiz*, 1997-NMSC-055.

NOW, THEREFORE, IT IS ORDERED that petitioner shall file her brief in chief on or before June 8, 1998, with respondent's answer brief due forty-five (45) days after the filing of petitioner's brief, and petitioner's reply brief, if any, due twenty (20) days after filing of respondent's

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answer brief in accordance with the Rules of Appellate Procedure;

IT IS FURTHER ORDERED that the briefs shall consolidate and update the briefs filed in the New Mexico Court of Appeals with respect to the issue identified, without incorporation by reference, and shall comment on the Court of Appeals memorandum opinion filed February 5, 1998; and

IT IS FURTHER ORDERED that oral argument may be requested pursuant to Rule 12-214 NMRA.
